SUBMISSION TO THE OFFICE FOR STUDENTS

Consultation on proposed regulatory advice and other matters relating to freedom of speech

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In this submission

- "The Act" means the Higher Education (Freedom of Speech) Act 2023.
- The "proposed guidance" means the proposed version of "Regulatory advice 24: Guidance related to freedom of speech".
- "ECHR" means the European Convention on Human Rights.
- "ECtHR" means the European Court of Human Rights.

Question 2: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 2 on free speech within the law?

The meaning of "within the law"

I interpret the phrase "within the law", as it occurs in the Act[1], to mean "not forbidden by any criminal or civil law or common law".[2] Paragraphs 13–15 of the proposed guidance say essentially the same thing, and should be retained.

Some people[3] may argue that universities should be free to enact restrictions on speech that *would* be permitted under Article 10(2) of ECHR if Parliament had enacted them — even though Parliament has not enacted those restrictions and perhaps even has explicitly decided *not* to enact them. **This interpretation of the Act should be rejected**, as it conflicts with the clear meaning of "within the law". After all, Article 10(2) does not in itself impose any restrictions on speech; it merely authorises states

[1]Sections A1(2,6,9), A3(a), A5(2), 5(1)(aa), 69A(1)(a), 69D(2)(a) and 69E(2), and Section 11(3)(6) of the Schedule.

[2]Thus, for instance, defamation, harassment, inciting racial or religious hatred, and inviting support for a proscribed terrorist organisation — *as those are defined by statute and the relevant case law* — would not be "within the law". Likewise for breach of confidence or violation of privacy, when they violate the common law on those subjects as defined by the relevant case law.

[3]See, for instance, Naomi Waltham-Smith and James Murray, "The OfS' free speech guidance for English universities goes too far", *Times Higher Education*, 11 April 2024, `https://www.timeshighereducation.com/blog/ofs-free-speech-guidance-english-universities-goes-too-far`

to do so under certain conditions. That faculty belongs to Parliament, not to individual universities; indeed, the whole point of the Act's protection of freedom of speech "within the law" is to *forbid* universities from imposing restrictions that go beyond what Parliament has enacted.[4] But since Waltham-Smith and Murray (footnote 3) do correctly point out that "The draft guidance quotes the scope for restriction in Article 10(2) but without even commenting on it", it seems to me that **the proposed guidance should be amended to *explicitly* reject this interpretation of the Act**, and to state explicitly that universities are *not* allowed to impose restrictions on speech that go beyond what Parliament has decided.[5,6]

Let me give a concrete example. In the Racial and Religious Hatred Act 2006, Parliament created a new criminal offence of "stirring up hatred against persons on religious grounds". In doing so, however, Parliament was mindful of the strong passions that can be excited, on all sides, by religion and religious ideas; and it was therefore also mindful of the potential negative effect of the proposed legislation on freedom of expression. Parliament therefore took great care to limit the offence to "us[ing] threatening words or behaviour, or display[ing] any written material which is threatening", and it furthermore required *intent* to stir up religious hatred as a required element of the offence (Section 29B(1)). Even more importantly, Parliament inserted an extremely strong and explicit protection for the freedom of expression:

> **29J Protection of freedom of expression**
>
> Nothing in this Part shall be read or given effect in a way which prohibits

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[4]Of course, the Act does allow universities to impose restrictions on speech if (but only if) securing that speech would not be "reasonably practicable". But concerning the type of restrictions on speech likely to be at issue here — namely, general rules forbidding or penalising certain types of speech — it would almost always be "reasonably practicable" simply *not to impose* such rules — as the proposed guidance makes clear with numerous examples.

[5]Section A1(13) of the Act defines "freedom of speech" as

> the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)

There is no reference in the Act to Article 10(2). I do acknowledge, however, that expression falling under Article 17 of the ECHR would fall outside Article 10(1) and therefore would not be "freedom of speech" within the meaning of the Act. **It might make sense for the guidance to be revised to point out this exclusion.** However, if that is done, it should also be mentioned that this criterion excludes only extreme ideas "akin to Nazism or totalitarianism". See, for instance, the references cited in *Forstater v CGD Europe and others*, Employment Appeal Tribunal, UKEAT/0105/20/JOJ (10 June 2021), `https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf`

[6]I have just seen the Universities UK response to this consultation, which argues that universities are entitled to impose, on their own, restrictions on speech, provided that they are compatible with Convention rights (i.e. Article 10(2)). But this misses the point of the Act (and of Section 43 of the Education (No. 2) Act 1986 before it). I agree that, *in the absence of the Act*, universities, as public authorities, would be free to impose restrictions on speech provided that they are compatible with Convention rights. But the Act changes this: universities are now required to protect freedom of speech within the law — that is, within the existing criminal, civil and common law — whenever it is "reasonably practicable". The Act thus *removes* from universities any authority that they may previously have had to impose restrictions on speech that go beyond existing law.

> or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

It would arguably have been consistent with Article 10(2) of ECHR had Parliament enacted a prohibition on inciting religious hatred *without* including any such provisos.[7] But Parliament chose to include those provisos (in my opinion wisely).

Suppose, now, that a university were to forbid "stirring up religious hatred" on campus, but *omitting* the requirement of threatening, or the requirement of intent, or the proviso set forth in Section 29J. I submit that such any such rule would be unlawful under the Act. **The guidance should be revised** to include an explicit warning to universities that any attempt to impose viewpoint-based restrictions on expression that go beyond what Parliament has enacted would be unlawful under the Act. (Reasonable viewpoint-neutral restrictions on the time, place and manner of expression are of course lawful. So are, within strict limits, viewpoint-based practical decisions such as the one mentioned in paragraph 107 of the draft guidance.)

This is not a mere quibble or technical legal point; it goes to the heart of the Act and the reasons for which it was enacted. Parliament decided to enact the Act *precisely because* it found that universities were not adequately protecting the freedom of speech and academic freedom, despite their existing obligation to do so under Section 43 of the Education (No. 2) Act 1986. It would completely subvert the purpose of the Act if universities were to be permitted, under a purported application of ECHR Article 10(2), to enact their own restrictions on free expression beyond what Parliament has legislated.

The scope of academic freedom

Waltham-Smith and Murray (footnote 3) observe correctly that the decisions of the ECtHR granting an enhanced level of protection under ECHR Article 10 to academic speech restrict that enhanced protection to expression that "fall[s] within or flow[s] from the academic's research or professional expertise and meet[s] minimum professional standards".[8] However, it is important to stress that **no such restriction occurs in the Act.** (If I am not mistaken, such a restriction was included in some earlier versions of the Bill and was *removed* by Parliament.) So, a lecturer's expression outside her main area of professional expertise might not receive enhanced protection under Article 10, were Parliament to attempt to restrict it using the powers granted by Article 10(2); but that is irrelevant to the protection of academic freedom under the Act. The Act (Section A1(6)) protects the "freedom within the law to question and test received wisdom, and

[7] For instance, the French "loi Pleven" of 1972 criminalises "provoking discrimination, hatred or violence towards any person or group of persons on account of their origin or their belonging or non-belonging to a given ethnic group, nation, race or religion" [translation mine], *without* any requirement of intent or threatening, and without any explicit protection for freedom of expression.

[8] See, for instance, *Erdoğan v Turkey*, ECtHR 346/04 and 39779/04 (2014). For further discussion, see James Murray, "The Thinkery and the Academy: Examining the legal parameters and interactions of academic freedom and freedom of expression under English law", *Current Legal Problems* **76**, 345–373 (2023), `https://doi.org/10.1093/clp/cuad002`

to put forward new ideas and controversial or unpopular opinions", *without restriction on the subject matter*.[9]

The ECtHR jurisprudence on academic freedom is cited in paragraph 29 of the proposed guidance; but the guidance fails to mention that *the Act* protects academic freedom *without* any restriction on the subject matter. **This omission should be corrected.** It should be explained that the two protections of academic freedom (ECHR and the Act) run in parallel, but they have importantly different definitions and scope; the conditions relevant to one need not apply to the other, and in the case at hand they do not.

Protection of philosophical belief under the Equality Act

Paragraph 16 of the proposed guidance lists the nine "protected characteristics" under the Equality Act 2010. However, one of these — "religion or belief" — is *particularly relevant* to the protection of freedom of speech on campus, and **the guidance should be revised to stress its scope and its importance.** First of all, I suggest to **add an extra paragraph explaining that**:

- "Religion means any religion and a reference to religion includes a reference to a lack of religion." (Equality Act 2010, Section 10(1))
- "Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief." (Equality Act 2010, Section 10(2))

Secondly, **paragraph 32, which explains the meaning of "philosophical belief", should be moved here**, since it concerns the *entire* Equality Act 2010 — notably the prohibitions on discrimination and harassment — and not just the PSED. This is very important, as the prohibitions on discrimination and harassment are mandatory and are capable of being invoked in court (for instance, in employment tribunals), while the PSED is merely hortatory.

It could also be useful, when "gender-critical belief" is mentioned, to include a footnote to the *Forstater* decision at the Employment Appeal Tribunal (cited above in footnote 5); this is particularly important since controversies around sex and gender are among the most volatile on university campuses today, and among the most likely to give rise to attempted infringements of the freedom of speech and academic freedom.[10]

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[9] This freedom has a very personal meaning to me, as I have frequently published highly controversial ideas, outside my main area of professional expertise, both in scholarly journals and books and in articles for the general public.

[10] See, for instance,

- Akua Reindorf, "Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System ...", report to the University of Essex, 17 May 2021, heavily redacted version available at `https://www.essex.ac.uk/-/media/documents/review/events-review-report-university-of-essex-september-2021.pdf`
- Judith Suissa and Alice Sullivan, "The gender wars, academic freedom and education", *Journal of Philosophy of Education* **55**(1), 55–82 (2021), `https://doi.org/10.1111/1467-9752.12549`
- Judith Suissa and Alice Sullivan, "The EDI opponents of equality, diversity, and inclusion",

Furthermore, the recent *Miller* decision at the Employment Tribunal[11] held that anti-Zionism is also a protected philosophical belief. In view of the current salience and intensity of debates around Israel and Palestine — especially on university campuses — it is worth including this belief in the list, along with a footnote to the *Miller* decision. Of course, out of fairness it should also be stated that Zionism is presumably also a protected philosophical belief, even though no court cases (to my knowledge) have yet arisen involving it.

Illiberalism Studies Program, 31 October 2022, https://www.illiberalism.org/the-edi-opponents-of-equality-diversity-and-inclusion

- Severin Carrell, "Edinburgh University cancels film screening after trans rights protest", *The Guardian*, 26 April 2023, https://www.theguardian.com/society/2023/apr/26/edinburgh-university-cancels-film-screening-after-trans-rights-protest
- Jack Grove, "Halt gender critical book launch, Edinburgh told by UCU branch", *Times Higher Education*, 10 October 2023, https://www.timeshighereducation.com/news/halt-gender-critical-book-launch-edinburgh-told-ucu-branch
- *Phoenix v Open University*, Employment Tribunal case nos. 3322700/2021 and 3323841/2021, 22 January 2024, https://www.judiciary.uk/wp-content/uploads/2024/01/Joanna-Phoenix-v-The-Open-University-Employment-Tribunal-Reserved-Judgment.pdf

[11] *Miller v University of Bristol*, Employment Tribunal case no. 1400780/2022, 5 February 2024, https://www.judiciary.uk/wp-content/uploads/2024/02/Miller-judgment-1400780.2022-JDT.pdf — see especially paragraphs 209–238.